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DOLORES A. ARREGUIN, for
herself and other members
of the general public similarly situated

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

DOLORES A. ARREGUIN, for herself and
other members of the general public similarly
situated,

Plaintiffs,

v.

GLOBAL EQUITY LENDING, INC., a
Georgia Corporation; and DOES 1 through 10,
Inclusive,

Defendants.

CASE NO. C 07-06026 MHP
[Filed: November 29, 2007]

*[Assigned for all Purposes to: Honorable
Judge Marilyn H. Patel]*

**SECOND SUPPLEMENTAL BRIEF IN
OPPOSITION TO MOTION TO COMPEL
ARBITRATION AND MOTION TO
DISMISS**

Date : August 11, 2008
Time : 3:00 p.m.
Place : Courtroom 15

1 Plaintiff, Dolores A. Arreguin, on behalf of herself and all others similarly situated, hereby
2 files her Second Supplemental Brief In Opposition to Defendant, Global Equity Lending, Inc.'s,
3 Motion to Compel Arbitration and Motion to Dismiss to brief the following issues:

4 1) Whether Plaintiffs complaint seeking reimbursement of expenses under Cal. Labor Code
5 2802 is an attempt to enforce the Loan Originator Agreement ("Agreement"), thus triggering the
6 venue and arbitration clauses therein; and

7 2) Whether the venue and arbitration clauses at issue, requiring Plaintiff to arbitrate her claim
8 in Georgia and applying Georgia law, constitute a waiver of her California created rights, specifically
9 those under Cal. Labor Code sections 2802 and 2804, and thus are against California public policy
10 and invalid.

11 As discussed below, 1) Plaintiff seeking reimbursement of expenses in this lawsuit, which
12 was never a benefit provided to employees, does not trigger the Agreement, and 2) the venue and
13 arbitration clauses constitute a waiver of her statutory rights in violation of California policy.

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1 **I. RELEVANT LANGUAGE OF THE AGREEMENT:**

2 The following is the relevant language of the Agreement necessary for a complete analysis of
3 the issues presented:

4 2. Compensation: For all services to be rendered hereunder, Loan Originator shall be paid on
5 a commission basis only [pursuant to] WLG's normal commission payroll practices in effect
6 from time to time. . . . Loan Originator shall ***not be entitled to receive any other
compensation or benefits from WLG of any kind or nature.***

7 7. Arbitration of Grievances: 7.1 General: . . . except as specifically provided to the contrary
8 in this Agreement, any controversy, claim or dispute arising out of or relating to this
9 Agreement (Grievance"). . . shall be resolved exclusively by arbitration in accordance with
this Paragraph 7. All Grievances. . . shall be resolved by arbitration in accordance with the
Commercial Arbitration Rules ("Rules") of the American Arbitration Association then in
effect. . . .

10 7.2 Waiver of Litigation: Paragraph 7 is and shall be the Parties' exclusive remedy for any
11 Grievance arising out of or relating to this Agreement.

12 7.4 Extraordinary Relief: The Parties agree that ***WLG has the right to seek preliminary and
temporary restraining orders, injunctions and other extraordinary relief.*** . . under
13 Paragraph 6 of this Agreement without complying with this Paragraph 7.

14 11. Governing Law: The enforcement of this Agreement shall be governed by the laws of the
15 State of Georgia and venue shall be in Cobb County or Gwinnett County Superior Court,
State of Georgia.

16 See Ain Decl. Exh. "A" (complete Agreement).

17 **II. PLAINTIFF'S STATUTORY RIGHTS ARE NOT ADDRESSED IN THE**
18 **AGREEMENT AND THEREFORE THIS ACTION IS NOT AN ATTEMPT**
19 **ENFORCE THE AGREEMENT OR RESOLVE ANY GRIEVANCE THEREIN.**

20 The Agreement is clear one the following issue. A Loan Originator shall ***not be entitled to***
21 ***receive any other compensation or benefits from WLG of any kind or nature.*** Thus, the
22 reimbursement of expenses under section 2802 was never contemplated by the parties to be part of
23 Plaintiff's employment and therefore is not part of this Agreement. If a benefit or right is not part of
24 the employment relationship, it cannot now be injected into an Agreement. Therefore, Plaintiff's
25 lawsuit does not seek to resolve a "grievance" arising out of the same. The only compensation
mentioned in the Agreement is the commission payments.

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Also, Plaintiff received a correspondence from Ms. Croteau, Director of Human Resources, confirming that:

The company's commission policy is structured to provide compensation for all expenses. The company does not provide additional compensation for an employee's use of his or her personal vehicle. (from page 80 of handbook # 15). Additionally **the company doesn't reimburse for nor provide cell phones, automobile expenses and office expenses.**

Ain. Decl Exh. "B." This is further evidence that the Agreement does not apply or relate to Plaintiff's lawsuit in that the company compensation policy never included the reimbursement of expenses sought under Cal. Lab. Code section 2802. Other than the payment of commission, the Defendant never intended, nor contemplated, that mileage reimbursement, as a statutory right or otherwise, would be an employment benefit bestowed on its employee. Again, neither does Plaintiff's claim arise out of the "commission payroll practices in effect from time to time" referenced therein. Nothing in the Agreement is triggered by Plaintiff bringing this lawsuit.

III. IF THE AGREEMENT'S PROVISIONS APPLY TO PLAINTIFF'S CLAIM FOR REIMBURSEMENT OF EXPENSES, THE AGREEMENT IS NOT ENFORCEABLE BECAUSE IT WOULD EFFECTIVELY WAIVE PLAINTIFF'S RIGHTS CONTRARY TO CALIFORNIA PUBLIC POLICY.

Arguably, if enforced, the Agreement would result in a waiver of many of Plaintiff's statutory rights, including her right to reimbursement and to recover attorney's fees under the applicable Labor Code. Georgia has no similar law under which Plaintiff can seek redress and arbitration of her claim. At the same time, the Agreement is not mutual in that it does not require Defendant to waive its right to seek redress in California courts. Thus, as argued in previous briefs in opposition to Defendant's Motion, the Agreement is unconscionable and contrary to a fundamental policy of California.

A. Georgia Law Does Not Have An Equivalence To Labor Code Section 2804

In determining enforceability of arm's length contractual choice-of-law provisions, courts shall apply principles set forth in section 187 of Restatement Second of Conflict of Laws, which reflect strong policy favoring enforcement of such provisions. *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal.4th 459, 464-465 (1992). Briefly restated, the proper approach under Restatement section 187, subdivision (2) is for the court first to determine either: (1) **whether the chosen state has a substantial relationship to the parties or their transaction**, or (2) **whether there is any**

1 **other reasonable basis for the parties' choice of law.** If neither of these tests is met, that is the end
 2 of the inquiry, and the court need not enforce the parties' choice of law. If, however, either test is
 3 met, **the court must next determine whether the chosen state's law is contrary to a fundamental**
 4 **policy of California.** If there is no such conflict, the court shall enforce the parties' choice of law. If,
 5 however, there is a fundamental conflict with California law, the court must then determine whether
 6 California has a "materially greater interest than the chosen state in the determination of the
 7 particular issue...." (Rest., § 187, subd. (2).) **If California has a materially greater interest than**
 8 **the chosen state, the choice of law shall not be enforced, for the obvious reason that in such**
 9 **circumstance we will decline to enforce a law contrary to this state's fundamental policy.** *Id.* at
 10 466. Federal courts applying California's conflicts law have also adhered to this approach. *Id.* at
 11 464(*Consul Ltd. v. Solide Enterprises, Inc.*, 802 F.2d 1143, 1146-47 (9th Cir.1986); *S.A. Empresa,*
 12 *Etc. v. Boeing Co.*, 641 F.2d 746, 749 (9th Cir.1981); *Sarlot-Kantarjian v. First Pa. Mortg. Trust,*
 13 *599 F.2d 915, 917 (9th Cir.1979)*). Absent a more prevailing policy, which Defendant has yet to
 14 articulate, requiring a class of California Plaintiffs seeking recourse under California law to litigate
 15 in Georgia would constitute a waiver.

16 Under section 2804, any contract or agreement, express or implied, made by any employee to
 17 waive the benefits of this article or any part thereof, is null and void, and this article shall not deprive
 18 any employee or his personal representative of any right or remedy to which he is entitled under the
 19 laws of this State. Cal. Lab. Code § 2804.

20 Here, Defendant's Agreement is an attempt to circumvent Plaintiff's California rights by
 21 applying Georgia law, which does not provide an employee with mileage reimbursement. See
 22 Declaration of Charles E. Hill In Support of Plaintiff's Second Supplemental Brief In Opposition To
 23 Motion To Compel Arbitration And Motion To Dismiss, ¶ 2. There is no doubt that the prompt
 24 payment of wages due an employee is a fundamental policy of this state. *Phillips v. Gemini Moving*
 25 *Specialists*, 63 Cal.App.4th 563, 571 (1998). Since there is no similar reimbursement statute in
 26 Georgia, applying Georgia law would be contrary to this state's fundamental policy. See Cal. Lab.
 27 Code § 2804.

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1 In *Cattuso v. Harte-Hanks Shoppers, Inc.*, the court held that the existence of an agreement
 2 concerning a mileage reimbursement rate would **not relieve the employer of the statutory**
 3 **obligation to provide complete reimbursement.** . . . *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42
 4 Cal.4th 554, 569-70 (2007). Then surely, Defendants Agreement and company policy, which goes
 5 further by outright eliminating mileage reimbursement from Plaintiff's benefits, constitute a waiver .

6 Further, courts will not enforce an arbitration provision requiring proceedings at a location
 7 that would impose a great financial burden on an employee forcing the employee to waive the right
 8 he or she is seeking to enforce. In *Patterson v. ITT Consumer Fin'l Corp.*, an adhesive loan
 9 agreement requiring California borrowers to submit to binding arbitration in Minnesota has been
 10 held unconscionable. Although arbitration itself may be within the reasonable expectations of
 11 consumers, **a Minnesota venue is not.** In addition, the consumer was required to make a prompt
 12 demand and prepay fees in order to obtain a participatory hearing. The likely effect was to deny a
 13 hearing to most borrowers, particularly because of the small amounts in controversy. *Patterson v.*
 14 *ITT Consumer Fin'l Corp.*, 14 Cal.App.4th 1659, 1664-65 (1997); See also *Lucas v. Gund, Inc.* (CD
 15 CA 2006) 450 F.Supp.2d 1125, 1134 (2006) (agreement requiring arbitration in New Jersey imposed
 16 too great a financial burden on California resident, and conflicted with federal venue rule).

17 Here also, Plaintiff would have to pay Arbitration fees and bear more travel expenses going
 18 back and forth across the country to recover her mileage expenses she incurred during her
 19 employment. Surely this is a failing proposition that no individual would pursue (even if gas prices
 20 and cost of transportation have not risen).

21 **B. Enforcing the Agreement Would Waive Plaintiff's Right to Attorney's fees**

22 Another reason Plaintiff would not be willing to arbitrate her small claim in Georgia, under
 23 Georgia law, is that the Arbitration Agreement denies her yet another statutory right to attorney's
 24 fees under Labor Code Section 2802(c). The Agreement requires that the Commercial Arbitration
 25 Rules apply to an Arbitration between the parties. The application of these Rules would also result
 26 in a waiver of Plaintiff's rights and remedies under California labor laws.

27 Under the AAA "Rules" Expenses:

28 All other expenses of the arbitration, including required travel and other expenses of the
 arbitrator, AAA representatives, and any witness and the cost of any proof produced at the

1 direct request of the arbitrator, shall be borne equally by the parties, unless they agree
2 otherwise or unless the arbitrator in the award assesses such expenses or any part thereof
against any specified party or parties.

3 See Ain Decl. Exh "C" (relevant excerpts of AAA's COMMERCIAL ARBITRATION RULES,
4 Rule 50, Administrative Fees (available online at Amended and Effective September 1, 2007
5 <http://www.adr.org/sp.asp?id=22440%20#R50> (viewed on July 23, 2008)).

6 The above referenced and applicable "Rules" are contrary to Cal. Labor Code section 2802,
7 in that Plaintiff would not be entitled to recover her attorney's fees incurred by . . . enforcing the
8 rights granted by [section 2802]. See Cal. Lab. Code § 2802(c). This is a waiver of Plaintiff and the
9 classes' right to attorney's fees and another hurdle requiring that the employee, rather than the
10 employer, bear the costs of any arbitration, and thus contrary to California policy.

11 The Federal Courts are on board with this analysis. The Supreme Court endorsed a system
12 of arbitration in which **employees are not required to pay for the arbitrator assigned to hear**
13 **their statutory claims.** *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83,
14 95 (2000). There is no reason to think that the Court would have approved arbitration in the absence
15 of this arrangement. Indeed, we are unaware of any situation in American jurisprudence in which a
16 beneficiary of a federal statute has been required to pay for the services of the judge assigned to hear
17 her or his case. *Id.* In *Gilmer v. Interstate/Johnson Lane Corporation*, the court opined that
18 arbitration is supposed to be a reasonable substitute for a judicial forum. Therefore, it would
19 undermine Congress' intent to prevent employees who are seeking to vindicate statutory rights from
20 gaining access to a judicial forum and then require them to pay for the services of an arbitrator when
21 they would never be required to pay for a judge in court. *Armendariz*, fn. 6 (*Gilmer v.*
22 *Interstate/Johnson Lane Corporation*, 500 U.S. 20, 28 (1991)).

23 Also in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985), the
24 Supreme Court's dictum – that a party in agreeing to arbitrate a statutory claim, "does not forgo the
25 substantive rights afforded by the statute [but] only submits to their resolution in an arbitral . . .
26 forum" – is as much prescriptive as it is descriptive. *Id.* That is, it sets a standard by which
27 arbitration agreements and practices are to be measured, and *disallows forms of arbitration that in*
28 *fact compel claimants to forfeit certain substantive statutory rights.* *Armendariz*, 24 Cal.4th at 99-

1 100.

2 **C. The Agreement Waives Plaintiff's Rights But Not Those of Plaintiff**

3 Finally, the agreement is not mutual. In the Agreement, "the Parties agree that *WLG has the*
 4 *right to seek preliminary and temporary restraining orders, injunctions and other extraordinary*
 5 *relief.* . . under Paragraph 6 of this Agreement without complying with this Paragraph 7. It only
 6 forces Plaintiff to surrender her rights and providing her with an exclusive remedy (arbitration in
 7 Georgia under Georgia Law), while Defendants can seek relief from California courts.

8 This is yet another reason not to enforce the Agreement. See *Stirlen v. Supercuts, Inc.*, 51
 9 Cal.4th 1519, 1534 (1997) (an employment contract arbitration clause that required employees to
 10 arbitrate all claims (and limited their remedies to compensatory damages) while allowing the
 11 employer to litigate certain types of disputes, has been held unconscionable and unenforceable.).
 12 While Defendant is not required to waive any rights, Plaintiff does. Arbitration of her claims in
 13 Georgia under Georgia law that does not provide relief for her claims or the claims of the putative
 14 class.

15 **IV. CONCLUSION**

16 For the above stated reasons and other arguments made in prior briefing, the Agreement is
 17 unenforceable and the Court should deny Defendants Motion to Compel Arbitration in Georgia.

18
 19 DATED: July 28, 2008

LAW OFFICES OF HERBERT HAFIF, APC

20
 21 By: _____

Farris E. Ain
 Attorneys for Plaintiff, DOLORES A.
 ARREGUIN, for herself and other members of
 the general public similarly situated

PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 269 West Bonita Avenue, Claremont, CA 91711.

On July 28, 2008, I served the foregoing document described as: **SECOND SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTION TO COMPEL ARBITRATION AND MOTION TO DISMISS**

☐ by placing the true copies thereof enclosed in sealed envelopes addressed as follows:
☒ by placing ☐ the original ☒ a true copy thereof enclosed in sealed envelopes addressed as follows:

[SEE ATTACHED MAILING LIST]

☒ I deposited each envelope in the mail at Claremont, California.¹ The envelope was mailed with postage thereon fully prepaid.

☒ As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the United States Post Office on that same day with postage thereon fully prepaid at Claremont, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ As follows: I am "readily familiar" with the firm's practice for delivering overnight envelopes or packages to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served, at the address as last given by that person on any document filed in the cause and served on the party making service.

☒ By filing with the U.S. District Court's CM/ECF filing system.

¹ By mail signature must be of person depositing envelope in mail slot, box or bag.

[] (State or Federal) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[X] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on July 28, 2008, at Claremont, California.


Gwendolyn Simmons

SERVICE LIST

Dolores A. Arreguin v. Global Equity Lending, Inc.
U.S.D.C. Case No. C 07 6027 MHP

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